LIBRARY
SUPREME COURT, U. S.
FEB 2 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

HERALD PRICE FAHRINGER
RICHARD LIPSITZ
One Niagara Square
Buffalo, New York 14202
Counsel for Petitioner

Of Counsel:

EUGENE GREESMAN
1730 K Street, N. W.
Washington, D. C. 20006

February 2, 1966.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR REHEARING

Petitioner respectfully requests a rehearing of the order of this Court dated January 17, 1966, denying the petition for writ of certiorari, to the end that the petition be granted upon such reconsideration. As grounds for rehearing, petitioner states as follows:

The sole question presented in the petition for writ of certiorari was whether the use by a union officer of

union-authorized increases in salary and expense accounts for payment to others in connection with union merger negotiations constitutes an embezzlement, stealing, abstracting or conversion within the meaning of § 501(c) of the Landrum-Griffin Act.

But the sharpness of that question may have been blunted in the certiorari proceedings by the Government's insistence (Opp., pp. 3-4, 7, 9) that petitioner's conduct was but a part of a single conspiracy, an overall pattern of siphoning union funds to certain co-conspirators. The fact is, however, that petitioner's part in the alleged conspiracy—which gives rise to the above question—was completely separate and distinct from the remainder of the asserted plot. Nearly three-fourths of the trial testimony concerned other defendants who at different times and in different ways siphoned-off funds of other locals, using fradulent expense vouchers and payroll dummies. Those activities in no way involved the petitioner; they related to union locals, to periods of time and to techniques of embezzlement which in no way implicated the petitioner Scalza.

So separate and distinct was petitioner's role that the original indictment made no mention whatever of the petitioner or of his Teamsters Local. Petitioner became involved only after the indictment was later amended by adding a new paragraph charging that, as a part of the single conspiracy, petitioner in his capacity as an officer of the Teamsters Local had been paid moneys from that Local's treasury in the form of salary and expense allowances; these moneys were alleged to have been paid over to certain defendants and co-conspirators. The testimony showed that these activities occurred subsequent to 1961 in connection

with merger negotiations between the Teamsters Local and the Independent Local and that the salary and expense allowances in question had been all duly authorized by the executive board of the Teamsters Local. There was no allegation and no proof that these activities were in any way related to the actions of the other defendants in embezzling funds from the Textile Local or the Independent Local during the earlier period of 1957-1961.

Such a complete separation of offenses within the sweep of a single alleged conspiracy brings into operation the rule of *McElroy* v. *United States,* 164 U.S. 76, 81. Pursuant to a statute substantially similar to the present Criminal Rule 8(b),[1] the Court there held impermissible the consolidation for trial of two indictments, one charging five defendants for assault and arson occurring on May 1 and the other indictment charging three of the defendants with a separate arson occurring on April 16. In reply to the Government's contention that the defendants were not prejudiced by the consolidation, the Court stated:

> " . . . we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties

[1] Rule 8(b) of the Federal Rules of Criminal Procedure provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

> are not the same, and where the offenses are in nowise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute, and did not rest in mere discretion."

In other words, as was said by the Fourth Circuit in *Ingram* v. *United States,* 272 F.2d 567, 569-570:

> "Just as Rule 14 does not permit the Government to circumvent the prohibition of Rule 8(b), neither does the Harmless Error Rule, Rule 52(a), have this effect. The error here was no mere technicality. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. It is not 'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials'."

The answer of the court below to this problem was to assert, without substantiation, that there was evidence linking petitioner to the continuing conspiracy and to cite this Court's decision in *Schaffer* v. *United States,* 362 U.S. 511, 514. The denial of petitioner's motion for a severance was thus held to be proper. But unlike the *Schaffer* series of interstate transportations of stolen goods, as to each of which there was a common

group of defendants, the alleged embezzlements in the instant case were unrelated in time, personnel or method. Whatever may have been alleged in the indictment by way of petitioner having participated in the same series of acts constituting the offense, the proof at the trial established the separateness of petitioner's activities. See *Kotteakos* v. *United States,* 328 U.S. 750, 773. And that separateness is further demonstrated by the fact that the statutory issue as to the legality of petitioner's activities, the issue which was presented in the petition for writ of certiorari, was not available to any other defendant involved in the other transactions.

Thus, once the separateness and uniqueness of petitioner's transactions can be appreciated, the question presented in the petition for writ of certiorari assumes a position above and apart from the remainder of the alleged conspiracy. That the Government was able to defend its case before this Court by reference to the overall and unconnected actions of the co-conspirators is but another instance of the disabilities attaching to mass conspiracy trials in which disassociated offenses are lumped together. Such a practice not only prejudices jury consideration but hobbles and confuses appellate consideration of what are truly separable issues.

Considered in its proper and separate context, the question as to the correct interpretation of § 501(c) of the Landrum-Griffin Act is one worthy of this Court's consideration. The Government has not denied its importance. Indeed, as petitioner's reply brief noted, the Government's equation of § 501(c) with the broader fiduciary provisions of § 501(a) only adds to the importance of the question and to the need for definitive clarification by this Court.

CONCLUSION

For these reasons, the order denying certiorari should be vacated and the petition for writ of certiorari granted.

Respectfully submitted,

HERALD PRICE FAHRINGER
RICHARD LIPSITZ
One Niagara Square
Buffalo, New York 14202
Counsel for Petitioner

Of Counsel:

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

February 2, 1966.

CERTIFICATE OF COUNSEL

As counsel for the petitioner, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

HERALD PRICE FAHRINGER

RICHARD LIPSITZ

EUGENE GRESSMAN